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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 500

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JACOB L. SHERWOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 11, 1940

CERTIORARI GRANTED NOVEMBER 18, 1940

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SUPREME COURT OF THE UNITED STATES —

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1 In United States Circuit Court of Appeals for the Second Circuit

JACOB L. SHERWOOD, PLAINTIFF-APPELLANT

against

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE AND FREDERICK M. KAISER, DEFENDANT

Statement under rule 13

The above-entitled action was commenced by the filing of summons and complaint on or about April 1, 1939.

No answers have been interposed by either of the defendants. By notice of motion dated April 25, 1939, defendant The United States of America moved to dismiss the complaint herein, which motion was withdrawn by stipulation in open court upon condition that the above-entitled action be consolidated with the action pending in this court entitled "United States of America against Frederick M. Kaiser et ano.", and an order to that effect was entered on May 15, 1939.

Thereafter said stipulation and order of May 15, 1939, were vacated after motion made and the motion to dismiss the complaint made by defendant The United States of America was heard de novo.

The order dismissing the complaint herein was entered on November 22, 1939, and the appeal taken on December 22, 1939.

2 In United States District Court, Eastern District of New York

[Title omitted]

Notice of appeal.

SIR: Please take notice that the plaintiff, Jacob L. Sherwood, hereby appeals to the United States Circuit Court of Appeals of the Second Circuit from the order made and entered in the United States District Court for the Eastern District of New York on or about the 22nd day of November, 1939, dismissing the complaint of said Jacob L. Sherwood, and said plaintiff appeals from each and every part of said order, as well as from the whole thereof.

Dated, New York, November 27th, 1939.

Yours, etc.,

M. CARL LEVINE, MORGULAS & FOREMAN,

Attorneys for Plaintiff, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, New York City.

To: Harold M. Kennedy, Esq., United States Attorney, 271 Washington Street, Brooklyn, New York.

In United States District Court, Eastern District of New York

[Title omitted.]

Order appealed from

The defendant The United States of America having duly moved for an order for the dismissal of the complaint, and said motion having come on regularly to be heard on the 11th day of October, 1939,

Now, on reading and filing the notice of motion dated September 19, 1939, and the affidavit of Hyman H. Goldstein, verified the 19th day of September, 1939, in support of said motion, and the affidavits of Jacob L. Sherwood and Milton U. Copland, verified on the 2nd day of May, 1939, and October 6, 1939, respectively, in opposition to said motion, and after hearing Harold M. Kennedy, United States Attorney, and Hyman G. Goldstein, of counsel, in support of said motion, and M. Carl Levine,
4 Morgulas & Foreman, Esqs., Milton U. Copland, of counsel, in opposition thereto, and due deliberation having been had,

Now, on motion of Harold M. Kennedy, United States Attorney for the Eastern District of New York, attorney for the defendant United States of America, and on the memorandum of the Court filed herein, it is

Ordered, that the motion of the defendant be, and the same hereby is, granted.

Dated, Brooklyn, New York, November 22, 1939.

ROBERT A. INCH,
United States District Judge.

In United States District Court, Eastern District of New York

[Title omitted.]

Notice of motion to vacate, etc.

SIRS: Please take notice that the undersigned will move this Court at a Special Term for the hearing of motions, to
5 be held at the Courthouse thereof, Postoffice Building, 271 Washington Street, Borough of Brooklyn, City of New York, on the 27th day of September, 1939, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order directing the setting aside and vacating of an

order of this Court dated May 15, 1939, which consolidated the action on file in this Court bearing Docket No. Civil 309 with another action pending in this Court under Docket No. Civil 177, and for an order directing the dismissal of the complaint of Jacob L. Sherwood herein on the ground that the complaint fails to state a claim upon which relief can be granted.

Dated, Brooklyn, New York, September 19, 1939.

Yours, etc.,

HAROLD M. KENNEDY,
United States Attorney, Eastern District of New York,
Office and P. O. Address, 519 Federal Building,
Brooklyn, New York.

To: N. Carl Levine, Esquire, Morgulas & Foreman, Esquires, 521 Fifth Avenue, New York, New York.

6 In United States District Court, Eastern District of New York

[Title omitted.]

Affidavit of Hyman H. Goldstein, read in support of motion

EASTERN DISTRICT OF NEW YORK, *ss:*

Hyman H. Goldstein, being duly sworn, deposes and says: That he is an Assistant United States Attorney for the Eastern District of New York duly appointed according to law. That he is in charge of the above litigation and is familiar with all of the facts involved as a result of the inspection by him of the official records and correspondence forwarded to him by the Attorney General of the United States.

On January 27, 1933, Frederick M. Kaiser, one of the defendants in the above entitled action, entered into a contract in writing with the United States of America wherein he agreed to furnish all labor and materials and perform all work required for the construction of the Post Office at East Greenwich, Rhode Island. The price fixed for said contract was $47,272.29. The work was to commence after the date of receipt of notice to proceed, and was to be completed within 473 calendar days.

On January 28, 1933, the Fidelity & Deposit Company of Maryland executed a performance bond in the penal
7 sum of $24,000.00 in favor of the Government, conditioned upon the performance of said contract by the said Frederick M. Kaiser.

On February 6, 1933, the said Frederick M. Kaiser received notice to proceed. Article 9 of said contract provided that if the contractor refused or failed to prosecute the work with such

diligence as would insure its completion within the time specified, the Government might by written notice to the contractor terminate his right to proceed with the work, in which event the Government might take over the work and prosecute the same to completion, and hold the contractor and his surety liable for any excess cost.

On September 25, 1933, the Government notified the contractor, defendant Kaiser, that his right to proceed under the contract was terminated as of that date, due to unsatisfactory progress made thereunder. Notice was also given to the surety.

On October 28, 1933, at the request of the surety, the right of the contractor, the defendant Kaiser, to proceed with the work, was restored, and the surety's formal consent to such restoration was given November 16, 1933.

On the 16th day of November, 1933, the following stipulation and consent was executed by the defendant Kaiser and his surety, the Fidelity and Deposit Company of Maryland:

"Stipulation and Consent (1st)

"Whereas, on January 28, 1933, Frederick M. Kaiser of New York, New York, as principal, and the Fidelity & Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, as surety, entered into a bond to the United States of America in the penal sum of $24,000.00 conditioned for the performance by said principal of his contract
dated January 27, 1933, for construction, including
8 approaches, retaining walls, mechanical equipment, et cetera, of the Post Office at East Greenwich, Long Island;

"Whereas, on September 23, 1933, the Secretary of the Treasury having been advised that said principal had failed to make satisfactory progress on the work in accordance with the provisions of said contract, the right of the said principal to proceed with the work was terminated;

"Whereas, thereafter, representatives of the Government, said principal and said surety conferred relative to the possibility of reinstating the right of said principal to proceed with the work, and on October 17, 1933, said surety requested that the termination of said principal's right to proceed be withdrawn and that said principal be permitted to resume the work at as early a date as possible in order to get the building under cover before the winter weather sets in, as an agreement had been reached by both of said parties whereby said principal has deposited with a trust company, which both of said parties have named in New York, New York, the sum of $3200.00 in cash, with the understanding that no part of this amount will be used for any job

other than the aforesaid contract, or for any other purpose, without first obtaining said surety's consent, and as a result of the foregoing the Treasury Department by letter addressed to said principal on October 28, 1933, revoked its action in terminating said contract and agreed to allow said principal to proceed with the work on the condition that this action is without prejudice to any and all rights of the United States under the said contract and that the time for completion of all work embraced in said contract shall be 33 calendar days (from September 25, 1933, when said principal's right to proceed was
9 terminated after the date of this restoration) in addition to the time originally specified and previously approved; all to be in strict accordance with the letter addressed the Treasury Department on October 17, 1933, by said surety and the Treasury Department's letter dated October 28, 1933, and in accordance generally with the terms of said contract (copies of which said letters are hereto attached and are hereby made a part hereof):

"Now, therefore, it is hereby stipulated and agreed by the said principal and surety that both of them hereby consent and agree to remain bound on said bond dated January 28, 1933, for the performance of said contract after same has been or may be modified to the same extent as though the right of the said principal to proceed with said contract had not been terminated.

"Signed, sealed and delivered this 16th day of November, 1933.

[SEAL] "FREDERICK M. KAISER.

[SEAL] "FIDELITY AND DEPOSIT COMPANY OF MARYLAND."

The contractor, the defendant Kaiser, was authorized to proceed with the work on December 16, 1933. No work was performed by the said defendant Kaiser subsequent to the restoration of the right to proceed and on January 26, 1934, the said defendant Kaiser and the surety were again notified of the termination of his right to proceed. The surety notified the Government on April 4, 1934, that it did not elect to complete the work.

Bids were solicited and the contract to complete the work was awarded to DiSandro Brothers, $42,800.00 and the work was completed August 2, 1935. The defendant Kaiser had in the meantime received $10,422.00 in progress payments. The Government thereby incurred a loss of $15,861.85.

10 An action was commenced by the Government in the United States District Court for the Eastern District of New York against this contractor, the defendant Frederick M. Kaiser, and his surety, the Fidelity & Deposit Company of

Maryland, on January 17, 1939, to recover the sum of $15,861.85. The docket number is Civil 177. Both of these defendants have appeared in this action, filed their answers and demanded a jury trial.

On January 20, 1939, Jacob L. Sherwood filed an action in the United States District Court for the Eastern District of New York as assignee of Frederick M. Kaiser against the United States of America for $10,000.00. The docket number is Civil 180. The complaint was verified by the plaintiff Sherwood and alleged an assignment from Frederick M. Kaiser to him of the said Kaiser's claim to damages by reason of what he alleged was the Government's breach of its contract. The petition failed to state the date of the assignment nor the consideration therefor nor did it set forth the manner of its execution and failed to attach a copy thereof. In every particular it failed to comply with the provisions of Section 3477 of the Revised Statutes (31 U. S. C. A. 203). The statute above referred to expressly provides that all transfers, assignments and powers of attorney, made of any claim upon the United States, "shall be absolutely null and void" unless they are freely made and executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. The statute further provides that the assignment or the power of attorney or transfer must recite the warrant for payments and must be acknowledged by the person making them before an officer having authority to take acknowledgments. It should be certified by the officer, who shall read and fully explain the transfer, assignment or warrant of attorney to the person acknowledging the same at the time of the acknowledgment.

11 Your deponent communicated with the attorney for the plaintiff and informed him that unless this action is discontinued a motion for its dismissal will be made. Then, for the first time, deponent was informed that the plaintiff was a judgment creditor of the said Kaiser and that a motion will be made to amend the complaint to bring in Kaiser as a defendant so that instead of proceeding solely on the theory of assignment it will be bolstered by the pretense of a judgment creditor's action against a third party in accordance with the provisions of Section 795 of the Civil Practice Act of the State of New York. Such a motion was subsequently made.

Your deponent had a conversation with Frederick M. Kaiser, the defendant, subsequent to the date of the service of the motion to amend. Mr. Kaiser informed your deponent that Sherwood was in fact his partner, having advanced monies to him to proceed with the contract in the expectation of sharing in the profits

thereof; that he had permitted Sherwood to obtain a default judgment against him and had subsequently made a full assignment of his claim against the Government to Sherwood; that Sherwood was to receive only $4,000.00 of any prospective recovery against the Government and the balance was to belong to Kaiser; that the same law firm now representing Sherwood was to represent him (Kaiser); that Sherwood never attempted to collect any part of the judgment against him, either by garnishee of his salary, execution or otherwise; that it was never contemplated that Sherwood was to sue the Government on the assignment and, to quote defendant Kaiser's words, "a fast one was put over on me."

Revised Statute, Section 951 (28 U. S. C. A. 774), as amended, provided as follows:

"In suits brought by the United States against individuals no claim for credit shall be admitted upon trial except such as appear to have been presented to the General Accounting
12 Office for its examination and to have been by it disallowed, in whole or in part, unless it is proved to the satisfaction of the Court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure and that he was prevented from exhibiting a claim for such credit at the General Accounting Office by absence from the United States or by some unavoidable accident."

The decisions are decisive that the answer must show the presentation and disallowance by the General Accounting Office of the claim.

U. S. v. Patterson, 91 F. 854.

No such claim was ever presented to the General Accounting Office, either by the defendant Kaiser or by the plaintiff Sherwood and no such allegation appears either in the complaint herein or in the answer filed by the defendant Kaiser in the action bearing docket number Civil 177 aforementioned.

It would appear to be clear that the defendant Kaiser would be barred in setting up such a defense by way of a satisfactory set-off and that his assignee, the plaintiff Sherwood, should likewise be barred for that reason.

Furthermore, it is clear that the execution of the stipulation and consent by the said Kaiser and his surety on November 16, 1933, above referred to, would operate as a waiver of any claim for damages theretofore incurred by the contractor Kaiser as a result of any alleged breach of the contract by the United States for, in that very instrument, both the principal and the surety stipulated and agreed to remain bound on the surety bond for the performance of the contract to the same extent as if the right of

the principal to proceed with the contract had not been terminated.

That deponent respectfully submits that this action is a subterfuge to get around the statutory inhibition against
13 assignments. The fact that the plaintiff is a judgment creditor does not alter the situation in any manner in view of the express statutory provision of Revised Statutes 3477 (31 U. S. C. A. 203) expressly prohibiting such an action. What he cannot do directly as an assignee, the plaintiff cannot do indirectly by means of a friendly judgment obtained by default.

While it is true that assignments by operation of law, such as the passing of a claim against the United States to a receiver or trustee in bankruptcy of the claimant, has been held to be not within the prohibition of Section 3477 of the Revised Statutes (31 U. S. C. A. 203), yet it is clear that the order under Section 795 of the Civil Practice Act of the State of New York is not such an assignment by operation of law within the meaning of these decisions. It is merely a right conferred upon a creditor by the laws of the State of New York, but such right cannot enlarge the liability of the United States or the terms upon which it has consented to be sued. Certainly Section 795 of the Civil Practice Act of the State of New York can confer no rights of suit as against the United States.

In the language of Judge Story, speaking for the Supreme Court of the United States in Spofford v. Kirk, 97 U. S. 484:

"It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It incapacitates every claimant upon the United States Government from creating an interest in the claim in any other than himself."

In Nutt v. Knut, 200 U. S. 12, Justice Harlan, speaking for the Supreme Court, said:

"The obvious purpose of the statute is to forbid anyone
14 who was a stranger to the original transaction, to come between the claimant and the Government, prior to the allowance of a claim, and who, in asserting his own interest or share in the claim, pending its examination, might embarrass the conduct of the business on the part of the officers of the Government."

In National Bank of Commerce v. Dominie, 218 U. S. 356, the Supreme Court said:

"If any regard whatever is to be had to the intent of Congress, as manifested by its words, too clear, we think, to need construction, we must hold such a transfer to be absolutely null and void. Any other holding will effect a repeal of the Statute by mere

judicial construction, in disregard of the plain, unequivocal intent of Congress, as indicated by the Statute. * * *"

The words of that section are so clear and explicit that there cannot be, we think, any reasonable ground to doubt the purpose of this legislation. Congress had in mind all transfers and assignments of any claim on the United States or part of a claim or any interest therein. There must be a compliance with the conditions fully set out in the statute.

In Martin v. National Surety Company, 300 U. S. 588, Judge Cardozo, speaking for the Supreme Court, said:

"The Government was at liberty to hold the money back until demanded by the contractor personally, disregarding any assignment or power of attorney for its payment to another. * * * The provisons of the Statute making void an assignment or power of attorney by a government contractor are for the protection of the Government. * * * In the absence of such a rule the Government would be in danger of becoming embroiled in conflicting claims with delay and embarrassment, and a chance of multiple liability."

On March 9, 1939, Judge Marcus B. Campbell denied the motion of the plaintiff, Jacob L. Sherwood, to amend and to file an amended complaint and held that the Government would be entitled to a dismissal of the complaint as the assignment was null and void. He stated that in his opinion "the right to a dismissal of the complaint cannot be questioned and it is mandatory upon the Court to dismiss it. It, therefore, seems to me that the plaintiff should not be allowed to defeat the right of the Government to a dismissal by an amendment, but, if the plaintiff can make out a case, it should be done in a new action." On March 30, 1939, an order was entered herein by Honorable Marcus B. Campbell, United States District Judge, denying the motion for leave to amend without prejudice to the bringing of a new action.

Thereafter, the said Jacob L. Sherwood instituted a new action under docket No. Civil 309. A motion to dismiss the said last mentioned action was made by the United States Attorney and came on for argument before Honorable Mortimer W. Byers on May 3, 1939, at which time your deponent and the attorney for Jacob L. Sherwood agreed in open Court to withdraw the motion and to consent to a consolidation of the action brought under d'cket number Civil 177 entitled "United States of America, plaintiff, vs. Frederick M. Kaiser and Fidelity and Deposit Company of Maryland, defendants," with the action under docket number Civil 309 entitled "Jacob L. Sherwood, plaintiff, against United States of America and Frederick M. Kaiser, defendants."

That thereafter and on May 11, 1939, a stipulation was entered into between the attorneys for Jacob L. Sherwood and your deponent providing for such consolidation and withdrawal of the motion to dismiss the complaint of Jacob L. Sherwood and
16 an order was entered on the said stipulation by Honorable Mortimer W. Byers on May 15, 1939.

Further examination and consideration by your deponent disclosed that the procedure thus followed was improper and ineffective to accomplish the purposes which prompted its adoption, since it was not a proper case for consolidation. The suit brought by the United States as plaintiff in Civil 177 involves the general jurisdiction of the District Court and is triable by a jury; the defendants Frederick M. Kaiser and the Fidelity and Deposit Company of Maryland have already actually demanded a jury trial, whereas the suit of Jacob L. Sherwood against the United States, Civil 309, is brought under the provisions of the Tucker Act and the Court in exercising jurisdiction under the Tucker Act sits as a Court of Claims and it is triable by the Court without a jury. (28 U. S. C. A. 41 [20].) This is an entirely separate and distinct jurisdiction from its ordinary one.

U. S. v. Pfitsch, 256 U. S. 547.

Furthermore, it is manifest that a suit by the United States to enforce a claim asserted by it cannot be consolidated with a suit against the United States under the Tucker Act. Even if we consider the Sherwood suit as a counterclaim the impossibility of trying it in connection with the main issue of the case at bar survives for the reasons above noted and in particular because under Revised Statutes, Section 951 (28 U. S. C. A. 774), the answer must allege presentation and disallowance by the General Accounting Office of the claim.

It has been further held that an affirmative judgment against the United States may not be awarded on a counterclaim on a suit brought by it.

United States v. Nipissing Mines Co., 206 Fed. 431 (C. C. A. 2nd).

17 Wherefore, your deponent respectfully prays for an order directing the setting aside and vacating of the order of this Court dated May 15, 1939, and for an order dismissing the complaint of Jacob L. Sherwood with cost.

HYMAN H. GOLDSTEIN.

(Sworn to September 19, 1939.)

In United States District Court, Eastern District of New York

[Title omitted.]

Affidavit of Milton U. Copland, read in opposition to motion

STATE OF NEW YORK,
County of New York, ss:

Milton U. Copland, being duly sworn, deposes and says: I am an attorney associated with M. Carl Levine, Morgulas & Foreman, the attorneys for the defendant Frederick M. Kaiser, and make this affidavit in opposition to the instant motion for a dismissal of the complaint of Jacob L. Sherwood.

18 By motion dated April 25th, 1939, which was returnable on May 31st, 1939, this same motion was made in an action entitled "Jacob L. Sherwood against United States of America and Frederick M. Kaiser." At that time two actions were pending—the action by the United States of America against Frederick M. Kaiser and Fidelity & Deposit Company of Maryland, and the action which was brought by our office as attorneys for Jacob L. Sherwood entitled "Jacob L. Sherwood against United States of America and Frederick M. Kaiser."

The aforesaid motion to dismiss was withdrawn by consent of the United States attorney in open Court on condition that the actions be consolidated inasmuch as the same subject matter was involved, and a written stipulation was thereupon entered into and approved by this Court.

The action brought by Sherwood was under the Tucker Act, and brought as a judgment creditor's action by virtue of the Civil Practice Act of the State of New York, Section 795, which permits a judgment creditor upon order of the Court to institute suit against a debtor of the judgment debtor. As Mr. Sherwood was a judgment creditor of Frederick M. Kaiser in the sum of approximately $5,000, the action was brought against the United States of America and Kasier on Kaiser's claim for breach of contract against the United States of America. The Supreme Court order provides for payment of Sherwood's judgment out of any moneys he might recover against the United States of America.

The motion made on April 25th, 1939, is identical up to the bottom of page 7 of the affidavit with the present motion. The Government now seeks to introduce a new reason for a dismissal in addition to its previous argument, to wit: that the two actions which were consolidated by consent were not properly consoli-

dated and therefore Mr. Sherwood's complaint should be
19 dismissed. There is no further ground set forth urging the dismissal of the complaint.

The United States Attorney's arguments are all directed to the point that the two actions which have been consolidated are brought on different grounds and under different conditions. The contention made now in effect is that the actions should not have been consolidated and is not addressed to the complaint of Sherwood, which was fully set forth in the previous motion made by the Government. The United States Attorney states that the suit brought by the United States is triable by jury, and that the suit of Mr. Sherwood under the Tucker Act is triable by the Court without a jury. This we are perfectly willing to admit, but the Court should look to the practicalities of the situation. The action brought by Mr. Sherwood is one in which he will derive all his rights from Mr. Kaiser's claim against the Government, which is exactly what will be involved in the present action. If the United States shows that Kaiser, the contractor, is wrong, they will obtain the judgment, but if Sherwood can show that the United States breached its contract with Kaiser, than he will be entitled to obtain through Kaiser that part of his judgment which is awarded by the jury. The claim of Sherwood is in reality a claim of Kaiser's against the United States, which is merely being brought in Sherwood's name under the provisions of the Civil Practice Act. Sherwood was not a party to the contract with the Government, nor with Kaiser, the contractor.

The moving affidavit does not set forth a single reason that was not set forth in the previous motion why Sherwood's complaint should be dismissed. Consolidation of the two actions, which was originally done on consent of all parties, would best serve the interests of expedition and would avoid circuity of suits. It is this consolidation which the United States Attorney originally consented to that he is in reality opposing so strenuously now.

20 Under the broad powers of the Court in consolidation it is respectfully submitted that the United States Attorney's arguments are unwarranted and unsupported by the law or the facts in this case. Although the stipulation of consolidation is dated May 11th, 1939, no motion was made, nor any intimation given, that the United States Attorney had reversed his position and was in effect asking for a reargument of his previous motion. Apart from objecting to the consolidation, all that the United States Attorney is doing in the present motion is asking for a reargument of the previous motion which he agreed to withdraw. This procedure is not only unwarranted under the facts in this

matter, but is contrary to the purport and regulation of the rules of this Court. However, if the Court should see fit to consider this motion, counsel respectfully begs leave to submit the affidavit of Jacob L. Sherwood and memorandum submitted on the previous motion.

Wherefore, your deponent respectfully prays for an order denying the instant motion with cost.

MILTON U. COPLAND.

(Sworn to October 6, 1939.)

21 In United States District Court, Eastern District of New York

[Title omitted:]

Affidavit of Jacob L. Sherwood, read in opposition to motion

STATE OF NEW YORK,
County of New York, ss:

Jacob L. Sherwood, being duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action, and makes this affidavit in opposition to the instant motion to dismiss the complaint herein.

That the instant action was commenced against defendants, The United States of America and Frederick M. Kaiser, pursuant to a Court order obtained under Section 795 of the Civil Practice Act. By this statute the judgment creditor, if the Court so directs, is given the right to maintain an action against a third party against whom the judgment debtor may have a cause of action. An order was procured in the Kings County Supreme Court, a copy of which will be submitted upon the argument of this motion, giving the judgment creditor, Jacob L. Sherwood, the right to bring the instant action. A copy of said order has heretofore been served on the United States Attorney, and said order is specifically referred to in the complaint herein.

22 The Court will note that although the action is brought to recover the sum of $10,000, your deponent's right is specifically limited in the Court order to the amount of his judgment and costs, the balance still being subject to further Court order.

It can readily be seen, therefore, that the instant action is not brought within the purview of Section 3477 of the revised statutes (31 U. S. C. A. 203) since this action is brought by operation of law, as distinguished from a voluntary assignment. Deponent has been informed by his attorney that a memorandum will be presented to the Court setting forth the law in this regard.

With respect to the allegation made in the moving affidavit, to the effect that your deponent was a partner of Kaiser, deponent wishes to emphatically deny any such statement. The judgment which was obtained against Kaiser was on moneys loaned to him in a sum exceeding $4,000. The judgment obtained here was by no means a friendly judgment, and an exhaustive examination in supplementary proceedings was had, which will be presented to the Court upon the argument covering six different occasions upon which the judgment debtor was examined. The only reason that no garnishee was issued was the fact that there was a prior garnishee outstanding against Kaiser's salary.

The statement made at page 6 of the affidavit, "That Sherwood was to receive only $4,000 of any respective recovery against the Government," in itself would refute the previous statement that your deponent was Kaiser's partner, inasmuch as the loan made by your deponent was well over this figure.

Your deponent emphatically states that there was never any partnership arrangement, that the moneys advanced to Kaiser were advanced purely as a loan, and that there is absolutely no basis in fact for any such statement by Kaiser.

23 Your deponent has been informed by his attorneys that in the answer of defendant Kaiser in the action brought against him by the United States of America, he has not set forth any affirmative defense or counterclaim against the United States of America. This fact refutes the statement of law set forth in the moving affidavit, that the purpose of the statute (31 U. S. C. A. 203) is to prevent a stranger to the original transaction coming between claimant and the Government. In the instant case, the only one who has a right to assert an affirmative claim against the defendant United States of America in the instant action is your deponent, by virtue of the Court order heretofore made and entered.

In view of the foregoing, it is therefore respectfully submitted that the motion be denied.

JACOB L. SHERWOOD.

(Sworn to May 2, 1939.)

In United States District Court, Eastern District of New York

JACOB L. SHERWOOD, PLAINTIFF

against

THE UNITED STATES OF AMERICA AND FREDERICK M. KAISER, DEFENDANTS

Complaint

Plaintiff, complaining of the defendants, by his attorneys, M. Carl Levine, Morgulas & Foreman, respectfully sets forth and alleges, upon information and belief:

24 For a First Cause of Action

First. That at all times hereinafter mentioned, the plaintiff and his judgment debtor, Frederick M. Kaiser, as hereinafter set forth, were and still are citizens of the United States of America; plaintiff resides at 35-31 88th Street, Borough of Queens, City of New York; plaintiff's judgment debtor, Frederick M. Kaiser, had his principal place of business at all the times hereinafter mentioned at 101 Park Avenue, Borough of Manhattan, City, County and State of New York, and resides at 1078 East 32nd Street, Borough of Brooklyn, City of New York; and that the plaintiff's residence is in the Eastern District of New York and within the territorial limits of this Court.

Second. That this Court has due jurisdiction of the parties hereto, and of the subject matter hereof, and to hear and determine the issues herein, and that this action arises under the Act of March 3, 1887, c. 359, Secs. 1, 2, 24 Stat. 505, and amendments thereto; U. S. C., Title 28, Section 41 (20).

Third. That prior to the making of the agreement hereinafter set forth, the defendant The United States of America duly appropriated the necessary funds for the payment of said agreement, and for the labor and materials hereinafter mentioned.

Fourth. That heretofore and on or about the 27th day of January 1933, plaintiff's judgment debtor, Frederick M. Kaiser, and the defendant, The United States of America duly entered into an agreement in writing wherein and whereby the said Frederick M. Kaiser agreed to construct and complete and to furnish all labor and materials, and to perform all work required

25 for the construction, including approaches, retaining walls, mechanical equipment, etc., of the post office at East Greenwich, R. I., all in accordance with the provisions of specification therein referred to, dated December 14, 1932, the adden-

dum thereto, dated January 3, 1933; and in accordance with general provisions and drawings therein referred to in said specification, and in accordance with the instructions of the defendant The United States of America, and its representatives, employees, and departments, and the defendant, The United States of America agreed to pay to the said Frederick M. Kaiser the sum of $47,300.00 in installments as the work progressed, and provision was made in said contract whereby the defendant, The United States of America was authorized to order and direct the said Frederick M. Kaiser to perform other work and furnish other material in connection with the aforesaid, at prices either to be agreed upon or at fair and reasonable prices; and all things and materials necessary and required for the making of said agreement, and the labor and materials hereinafter mentioned have been duly done and performed, and that the agreement and the labor and material hereinafter mentioned were duly authorized.

Fifth. That said Frederick M. Kaiser duly filed with the defendant The United States of America a bond required for the due performance by it of the terms and conditions of the said contract, and the same was duly approved and accepted by the defendant The United States of America.

Sixth. That thereafter, said Frederick M. Kaiser duly entered upon the performance of the terms and conditions of said agreement and duly proceeded with the performance of the terms thereof in a manner as called for by said agreement and did various parts of excavation work, re-enforcing work, foun-
26 dation work, masonry work, structural steel and iron work and various other work called for by said agreement and substantially sublet all of the different classes of work required by said specification, plans and contract to various subcontractors and was duly performing the terms and conditions thereof. That thereafter, and on or about September 25, 1933, the defendant The United States of America without just cause or warrant notified the said Frederick M. Kaiser to discontinue the work under said contract, and said defendant The United States of America unlawfully, and in violation of the terms of said contract, terminated the same.

Seventh. That the said Frederick M. Kaiser was at all times duly ready, able and willing, and duly offered to perform the terms and conditions of said contract on his part to be done and performed, except as he was prevented in his performance of the contract for the reasons that defendant The United States of America unlawfully required said Frederick M. Kaiser to furnish labor and material in a manner contrary to and in a manner which was not provided for by said contract; it improperly

rejected labor and material that had been properly performed and furnished; it failed to provide proper drainage; it furnished plans and specifications of an improper nature, unworkable and inadequate for the purpose for which they were prepared; it unreasonably and unlawfully delayed the said Frederick M. Kaiser in the performance of his contract, in the furnishing of his labor and material, in the furnishing of proper plan, specifications and details, and in the making of decisions; it arbitrarily and unreasonably made false interpretations of the plans, specifications and details; it improperly harassed and interfered with said Frederick M. Kaiser's performance of the work under the contract and made false, fictitious and arbitrary demands and rulings.

27 Eighth. That thereafter, and on or about December 16, 1933, defendant The United States of America notified said Frederick M. Kaiser that he had been reinstated and directed him to proceed with the work. That, nevertheless, the defendant The United States of America acted unreasonably, unlawfully, arbitrarily and in violation of the terms of said contract in that it refused to permit said Frederick M. Kaiser to proceed with said work, unless and until he complied with certain conditions, which conditions were unreasonable, arbitrary, and contrary to the terms of said contract.

Ninth. That thereafter, and upon said Frederick M. Kaiser's refusal to comply with the arbitrary, unreasonable and unlawful conditions as aforesaid, and on or about January 26, 1934, the defendant The United States of America notified said Frederick M. Kaiser, in violation of the terms of said contract, that his right to proceed under his contract was terminated, and said contract was thereby terminated.

Tenth. That by reason of the aforesaid, the said Frederick M. Kaiser has been damaged in the sum of Ten Thousand ($10,000.00) Dollars.

Eleventh. That by order of the Supreme Court, Queens County, the plaintiff herein has been duly authorized and empowered to maintain this action as a judgment creditor of said Frederick M. Kaiser, nunc pro tunc as of September 1st, 1937.

Twelfth. That, upon information and belief, no other person or corporation has any interest therein, and no assignment or transfer of the claim, or any part thereof, or interest therein, has been made by said Jacob L. Sherwood, nor has any other order of any Court been issued authorizing the bringing of any other action on this claim.

28 Thirteenth. That Frederick M. Kaiser and plaintiff have at all times duly borne true allegiance to the Government of the United States, and they have not in any way voluntarily

aided, abetted, or given encouragement to rebellion against said Government.

Fourteenth. This suit is brought within six years after the right accrued for which the claim is made.

As and for a Second Cause of Action

Fifteenth. Plaintiff repeats, reiterates and realleges the allegations contained in paragraphs "First", "Second", "Third", "Fourth", "Fifth", "Sixth" and "Seventh" of this petition and complaint, with the same force and effect as though the same had been fully repeated and fully set forth herein.

Sixteenth. That during the course of the performance of said contract by the said Frederick M. Kaiser, the defendant The United States of America unlawfully and in violation of the terms of said contract demanded and required said Frederick M. Kaiser to perform certain labor and furnish certain material not called for by said agreement between the defendant The United States of America and said Frederick M. Kaiser made on the 27th day of January, 1933, as aforesaid, and by reason of such demands said Frederick M. Kaiser was compelled to and did perform other labor and furnish other material under protest, to his damage.

Seventeenth. That the defendant The United States of America failed and refused to pay for the labor and materials performed and furnished by the said Frederick M. Kaiser in accordance with said demand by the defendant The United States of America by reason of which said Frederick M. Kaiser was damaged in the sum of $3,085.45.

29 Eighteenth. That by order of the Supreme Court, Queens County, the plaintiff herein has been duly authorized and empowered to maintain this action as a judgment creditor of said Frederick M. Kaiser nunc pro tunc as of September 1st, 1937.

Nineteenth. That Frederick M. Kaiser and plaintiff have at all times duly borne true allegiance to the Government of the United States, and they have not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

Twentieth. This suit is brought within six years after the right accrued for which the claim is made.

As and for a Third Cause of Action

Twenty-first. Plaintiff repeats, reiterates and realleges the allegations contained in paragraphs "First," "Second," "Third," "Fourth," "Fifth," "Sixth," and "Seventh" of this petition and

complaint, with the same force and effect as though the same had been fully repeated and set forth herein.

Twenty-second. That the defendant The United States of America violated the terms of said contract in that it unreasonably, arbitrarily, unlawfully and in bad faith delayed said Frederick M. Kaiser in the performance of his contract and the doing of the work to be done thereunder in that, amongst other things, defendant The United States of America compelled said Frederick M. Kaiser to perform quantities of work not contemplated by the original contract; in that it made wrongful interpretations of the contract, plans and specifications; in that it delayed the approval of the work to be performed by the said Frederick M. Kaiser; in that it failed to provide proper drainage; in that it furnished plans and specifications of an improper nature, unworkable and inadequate for the purpose for which they were prepared; in that it unreasonably and arbitrarily made false interpretations of the plans, specifications and details; in that it unreasonably, unlawfully and arbitrarily required said Frederick M. Kaiser to do certain of the work at a time and in a manner not required or contemplated by the contract documents; all of which interfered with, prevented and delayed said Frederick M. Kaiser in the performance of his contract.

Twenty-third. That by reason thereof said Frederick M. Kaiser has been damaged in the sum of $1,360.04.

Twenty-fourth. That by order of the Supreme Court, Queens County, the plaintiff herein has been duly authorized and empowered to maintain this action as a judgment creditor of said Frederick M. Kaiser, nunc pro tunc as of September 1st, 1937.

Twenty-fifth. That Frederick M. Kaiser and plaintiff have at all times duly borne true allegiance to the Government of the United States, and they have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

Twenty-sixth. This suit is brought within six years after the right accrued for which the claim is made.

Wherefore, plaintiff prays for judgment against the defendant The United States of America for the sum of Ten Thousand ($10,000) Dollars.

M. Carl Levine, Morgulas
& Foreman,
By Albert Foreman,
Attorneys for Plaintiff, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, City of New York.

(Verified by Jacob L. Sherwood, March —, 1939.)

31 In United States District Court

Opinion of Inch, D. J.

The stipulation no longer exists and the order of May 15, 1939, has been duly set aside by Judge Byers. The motion to dismiss is therefore left free from the above. The attempt at an assignment is vain as the alleged transfer is void because it is premature—R. S. 3477. There has been no assignment by law—accordingly the motion to dismiss complaint of Jacob L. Sherwood is granted.

ROBERT A. INCH,
U. S. D. J.

OCTOBER 20, 1939.

In United States District Court, Eastern District of New York

Stipulation as to record

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.

Dated, New York, February 15, 1940.

M. CARL LEVINE, MORGULAS
& FOREMAN,
Attorneys for Plaintiff-Appellant.
HAROLD M. KENNEDY,
United States Attorney,
Attorney for Defendant-Appellee.

32 [Clerk's certificate to foregoing transcript omitted in printing.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 306—October Term, 1939

(Argued May 3, 1940. Decided June 3, 1940)

JACOB L. SHERWOOD, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Eastern District of New York

Action by Jacob Sherwood against the United States of America and Frederick Kaiser. From an order granting a motion of the United States of America to dismiss the complaint, plaintiff appeals. Reversed.

Before L. HAND, AUGUSTUS N. HAND, and CLARK, Circuit Judges.

Milton U. Copland, of New York City (M. Carl Levine, Morgulas & Foreman, of New York City, on the brief), for plaintiff-appellant. Sidney J. Kaplan, Sp. Asst. to the Atty. Gen., of Washington, D. C. (Harold M. Kennedy, U. S. Atty., Eastern Dist. of N. Y., and Francis M. Shea, Asst. Atty. Gen., and Maurice W. Hibschman, Atty., Dept. of Justice, both of Washington, D. C., and Vine H. Smith, Asst. U. S. Atty., Eastern Dist. of N. Y., on the brief), for the United States.

CLARK, Circuit Judge.

This is an action by Jacob Sherwood, as judgment-creditor of Frederick Kaiser, brought against the United States of America and Kaiser, to recover damages claimed to be due Kaiser upon the latter's contract with the United States for the construction of a post office. Suit is brought in the district court upon the theory that the claim was one properly cognizable under the Tucker Act, 28 U. S. C. A. §§ 41 (20) and 250, by which the United States consents to be sued in certain cases, in either the district court or the court of claims.[1] Sherwood and Kaiser are both residents

[1] The original Tucker Act, Mar. 3, 1887, c. 359, 24 Stat. 505, which extended jurisdiction to the district courts previously limited to the court of claims, was in form repealed, but in effect restated in the Judicial Code of 1911, §§ 24 (20), 145, 297, 36 Stat. 1093, 1136, 1168.

of the State of New York. Sherwood obtained his judgment against Kaiser in the New York Supreme Court, and pursuant to New York Civil Practice Act, § 795, he procured an order from that court permitting him to bring an action against the United States as a debtor of Kaiser, his judgment-debtor. Purporting to act under the New York order, he then brought the present action, wherein he joined Kaiser as a party defendant, as the New York statute provides.[2] The motion of the United States to dismiss the complaint was granted and plaintiff appeals.

When this action was brought there was pending in the court below an action brought by the United States against Kaiser and the surety on his bond to recover damages for nonperformance of this same construction contract. The parties herein stipulated for the consolidation of this action with the earlier one and an order of consolidation was entered. Then the Government, though it had sought the consolidation, came to doubt the validity of that step and obtained a vacation of this action. Appellant did object to the vacating of the consolidation order, but does not press his objection here, being apparently quite content to keep his claim separate from the claim of the United States against Kaiser. But if we are correct in the views we set forth hereinafter, consolidation was a matter well within the discretion of the court. We shall refer to it because of the obvious procedural economy of judicial action it here presents. Unless we are prevented by some positive rule of law which embodies an overriding public policy, we think it in the public interest that these conflicting claims arising out of a single matter—Kaiser's performance or nonperformance of his contract with the United States—should be settled in one action. That is the trend of modern procedural reform, as exemplified by the new federal rules of civil procedure, in the development of which high officials of the appellee itself assumed such effective leadership.

Indeed, if the new rules are applicable, they justify the procedure which the court below originally followed. They furnish

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[2] N. Y. C. P. A. § 795 is as follows: "Action by judgment-creditor against third party. Where it appears from the examination or testimony taken or other proof satisfactory to the court that a person or corporation is indebted to the judgment-debtor, the court may make an order authorizing the judgment-creditor to maintain an action against such person or corporation for the recovery of such debt. Such order may also forbid the transfer or other disposition of such debt until an action can be commenced and prosecuted to judgment and may direct that the papers or proof in the possession or control of the debtor and necessary in the prosecution of such action be delivered to the creditor or impounded in court. Such order or the judgment entered in the authorized action may provide for the disposition of any moneys in excess of the sum required to pay the creditor's judgment, costs, disbursements, and expenses allowed by the court. Such action by a judgment-creditor against the debtor of the judgment-debtor shall make the judgment-debtor a party defendant, and costs shall be awarded as prescribed by law; but if judgment be in favor of the judgment-creditor and against the debtor of the judgment-debtor, and the debtor of the judgment-debtor did not dispute the indebtedness, then costs are not to be awarded against the debtor of the judgment-debtor."

a reply to appellee's first contention that New York Civil Practice Act, § 795, ex proprio vigore, cannot confer any power to sue in the federal courts. We think Rule 17 (b) is against this contention. That rule states that "the capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile." Compare Bicknell v. Lloyd-Smith, 2 Cir., 109 F. 2d 527. Nothing in the law of the State of New York limits the capacity to sue conferred by Section 795 to a capacity to bring actions in the state courts alone.

It is argued that the new rules do not apply to Tucker Act cases brought in the district court. The intent that they should apply is made manifest throughout the rules. Rules 1 and 81 carefully provide that they shall apply to all suits of a civil nature, whether cognizable as cases at law or in equity, except those specifically excepted; and the character of the proceedings which it was thought necessary to except by express statement in Rule 81, as well as the language of these rules, shows that the new "civil action" includes actions against the United States. Careful protection of the rights of the United States as a party are made in various provisions, such as those giving the United States 60 days to plead, instead of the 20 days allowed the ordinary litigant, Rule 12 (a); and see also Rules 4 (d) (4), 13 (d), 25 (d), 37 (f), 39 (c), 45 (c), 54 (d), 55 (e), 62 (e), and 65 (c). The official notes of the Advisory Committee show the Committee's view that while certain of the procedural provisions of the Tucker Act were continued intact others were modified by the rules.[3] See also 1 Moore's Federal Practice 248–250.

We are cited to the high authority of Lynn v. United States, 5 Cir., 110 F. 2d 586, as holding otherwise; and the court there seems prepared to go to the length of holding the rules wholly inapplicable to Tucker Act cases, although it is not clear that so broad a ruling was required in the case there presented. With all deference we cannot go so far; and we think the statute, 28 U. S. C. A., § 761, which was the court's authority for its view, persuades to the contrary. Only five sections of the statutes deal directly with procedure in Tucker Act cases. 28 U. S. C. A., §§ 761–765, Act of Mar. 3, 1887, §§ 4–7, 10, 24 Stat. 506, 507. Of these, 28 U. S. C. A., § 761, states that "The course of procedure for the district courts and the court of claims in cases under section 41, paragraph 20, and section 250 of this title, insofar as applicable and not inconsistent with sections 762 to 765, and the procedure prescribed for the court of claims shall be in accordance with the established rules of said respective courts, and of such additions

[3] See note 4, below, for the particular rules here involved.

and modifications thereof as said courts may adopt." Sections 762–765 contain no inconsistencies presently relevant.[4] It has been held that so far as the rules modify these sections the rules prevail, United States v. American Surety Co., D. C. E. D. N. Y., 25 F. Supp. 700, but that question is not before us. If the new district court procedure does not apply under Section 761, we may well ask what procedure the district courts are to follow in adjudicating on claims against the United States. In Bates Mfg. Co. v. United States, 303 U. S. 567, 571, the Supreme Court pointed out that the Tucker Act was originally passed to relieve the congestion of claims in the court of claims for which the Government was to be justly censured, and to provide "adequate opportunity for expeditious and orderly determination of claims against the Government." To effectuate such a purpose, procedure carefully designed to secure orderly and expeditious settlement for all litigation would appear to be peculiarly apt.

Appellee reinforces its contention that the new rules are inapplicable by pointing out a difference in form of trial between this action and that with which it was originally consolidated. Under 28 U. S. C. A., § 41 (20), trial of Tucker Act claims must be to the court without a jury, and Rule 39 (c) expressly preserves that right. On the other hand, an action brought by the United States for breach of contract may be claimed for jury trial, and the Government's action against Kaiser and his surety has been claimed for such trial by the defendants. But it is a commonplace of the state code action, with its possible numerous and diverse issues, that different forms of trial may be necessary for different issues. Such necessity does not prevent the all-inclusive nature of the action and the procedural gains which result from a settlement of all angles of a dispute in a single adjudication. The new federal rules expressly adopt this practice. Form of trial is determined for each issue, not for the action as a single unit. Rules 38 and 39; James, Trial by Jury and the New Federal Rules of Procedure, 45 Yale L. J. 1022; Pike and Fischer, Pleadings and Jury Rights in the New Federal Procedure, 88 U. of Pa. L. Rev. 645.

Appellee goes further, however, and urges that with respect to claims against the United States the district courts exercise a special jurisdiction concurrent with the court of claims and similarly circumscribed. The Supreme Court cases make clear that this similarity is one of the substance of the rights and privi-

[4] The Committee's notes to Rules 3, 4 (d) (4), 11, 12 (a), 52 (a), 55 (e), and 75 point out that substantially all the provisions of §§ 762–765 are continued—including such requirements as verification of the petition or complaint (Rule 11) and the filing of a written opinion giving the court's findings of facts and conclusions of law, compare Rule 52 (a)—with some slight addition without change of substance of §763 by Rule 4 (d) (4) as to service and notice of suits.

leges of the claimants; there is nothing in them which asserts the necessity of identic procedure. Bates Mfg. Co. v. United States, supra; United States v. Pfitsch, 256 U. S. 547. True, some cases in the court of claims refer to procedural obstacles as though they were jurisdictional. Thus in Waite v. United States, 57 Ct. Cl. 546, that court suggests its lack of jurisdiction to allow an intervening defendant to come into a suit on a claim before it. But a distinction should be made between the grant of power to adjudicate a claim against the United States and the manner or procedure by which that power shall be exercised. The statutory provision here, 28 U. S. C. A. § 41 (20), 24 Stat. 505, allows the district court to hear claims "upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable." This is a general grant of power in the circumstances stated, without limitation as to procedure. Indeed, the statute quoted above, 28 U. S. C. A. § 761, contemplates differences in practice in the two courts. Limitations on procedure in the court of claims, therefore, cannot be jurisdictional defects in the district courts. There is no reason why the court of claims may not adopt the new district court procedure at any time. Moreover, Rule 17 (b) here merely restates former federal practice.[5] Whether or not it is made applicable in the court of claims, it appears to be a procedural rule not going to the district court's jurisdiction.

The same considerations answer appellee's contention that, since Kaiser should be joined as a defendant under New York Civil Practice Act, § 795, suit against it cannot be brought under the doctrine of Waite v. United States, supra. But whatever the practice as to joinder may be in the court of claims, we cannot view it as a question of primary jurisdiction of the district court. The provision of the New York statute is obviously for the protection of the judgment-debtor with reference to the balance above the amount of the judgment-creditor's claim and for the protection of the third-party debtor, assuring him that the matter in issue will become res judicata after judgment is entered. Joinder for the latter purpose is, of course, for the benefit of the appellee. So far as the judgment-debtor has any separate controversy with the plaintiff, the court's power to adjudicate separate issues in one

[5] Rule 17 (b) did change the controlling law from that of the state where the district court was being held to that of the domicile—a change of no importance here in view of Sherwood's New York domicile. Advisory Committee's notes to Rule 17 (b); 2 Moore's Federal Practice 2084, 2085. Compare also Rule 17 (a) for suit in the name of the real party in interest, with its provision that "a party authorized by statute may sue in his own name." 2 Moore's Federal Practice 2074; Clark, Code Pleading, 124.

action and to order separate trials if desirable [Rule 42 (b)] is adequate to prevent injustice or even inconvenience to the Government. The alignment of parties to a civil action now is not a matter of fundamental importance; under Rule 19 (a) a person can even be made an involuntary plaintiff. We see no reason why Kaiser cannot be a defendant in the present action without destroying jurisdiction.

Appellee further contends that Rule 17 (b) is inapplicable in the face of R. S. § 3477, 31 U. S. C. A. § 203, prohibiting assignment of a claim against the United States before the claim is allowed. As we read New York Civil Practice Act, § 795, it does not bring about an assignment or transfer of title of the debt to the judgment-creditor, but merely confers upon him a power to bring an action. This conclusion seems to be supported by a consideration of the background and history of the legislation; we shall have occasion to note below that it was passed to supplement existing statutes providing on the one hand for levy on wages, debts, and like claims, and on the other for enforcement of such claims through receivership proceedings.[6] But even if Section 795 does provide for an actual assignment of the claim, nevertheless it is then an assignment by operation of law. The assignor has had no part in it; the act is wholly in invitum so far as he is concerned. R. S. § 3477, 31 U. S. C. A. § 203, applies only to voluntary assignments, and not to all of those (Goodman v. Niblack, 102 U. S. 556); it does not reach assignments by operation of law. Brooks v. Mandel-Witte Co., 2 Cir., 54 F. 2d 992; Western Pac. R. R. v. United States, 268 U. S. 271. The purpose of R. S. § 3477 is to protect the Government from traffic in claims against it, and no trafficking can result from a court order appointing the judgment-creditor as the person entitled to bring suit, and enjoining the judgment-debtor from interfering therewith. The judgment-creditor then becomes the real party in interest under Rule 17 (a) and as such is the proper party plaintiff. Rosenblum v. Dingfelder, 2 Cir., 111 F. 2d —.

Appellee complains that the New York judgment was not sufficiently alleged in the plaintiff's complaint. A general alle-

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[6] From the time of David Dudley Field and the original New York Code of Civil Procedure to the present, the procedure to effect execution of a judgment has been considered inadequate, and steps have been advocated and taken to provide better remedies for judgment-creditors. The matter was studied by the New York Commission on the Administration of Justice and by the New York Judicial Council, and on recommendation of the latter, new remedies were provided by the legislature in 1935, of which the statute here in issue was one. This history is recounted in I. H. Cohen, Collection of Money Judgments in New York, 35 Col. L. Rev. 1007, 1196, 36 Col. L. Rev. 1061. See also Comment, 48 Yale L. J. 1377. Federal Rule 69 (a) expressly provides that the procedure on execution in the federal courts, "in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution," shall be in accordance with state practice and procedure.

gation of a court judgment is authorized by Rule 9 (e), and the form of allegation contained in this complaint appears to be quite adequate under that rule. In any event, the rules provide means for securing detailed information [Rules 12 (e), 26 et seq.]; and it is clear from the papers in the record that defendant had sufficient information as to the court's order to enable it properly to prepare its defens .

It is also vigorously asserted that the effect of the New York statute is to provide for garnishment, and that the United States cannot be subjected to garnishment. This contention presents questions as to both the aptness and the adequacy of the suggested analogy. Since the Supreme Court in Buchanan v. Alexander, 4 How. 20, in 1846, vacated an "attachment" of moneys due seamen on a war vessel because national funds specifically appropriated for one purpose could not be otherwise used, it seems to have been generally believed that garnishment would not lie against the United States. But as pointed out in Federal Housing Administration v. Burr, 309 U. S. —, 60 S. Ct. 488, the reason for the Buchanan decision was that the United States could not then be sued. As Justice Douglas says, garnishment is simply a form of suit, and when consent to sue is granted, that consent would normally include the process of garnishment, unless there are exceptional circumstances to show its exclusion. Hence the Court in the Burr case held that a Congressional grant of consent to sue the Federal Housing Administration subjected it to garnishment process.[7] It would follow, therefore, that, where the United States has consented to be sued, without limitation on the manner thereof, suit by garnishment is included in such consent, unless other statutes show a policy to the contrary or provide restrictions on the remedy. In the light of the Burr case the question whether garnishment or like process may be brought on a Tucker Act claim must be reëxamined.

We do not propose such a general reëxamination at this time, for the statutes providing for what is generally termed inclusively "garnishment" are of such varying form as to make abstract propositions of little value. We have seen that there are various statutes limiting the enforcement of Tucker Act claims, such as the one restricting assignments which we have discussed above. How far those laws may apply to a particular state statute of "garnishment" must be considered as each case is presented. We have already indicated our view that no federal statutes prevent the

[7] The court held, however, that such consent did not of itself go so far as to justify execution against funds in the United States Treasury, even though the judgment might thus be rendered ineffective for lack of an appropriation to satisfy it. Compare discussion of the Burr case in the majority and dissenting opinions in Reconstruction Finance Corp. v. J. G. Menihan Corp., 2 Cir., 111 F. 2d. —. And see also United States v. Winkle Terra Cotta, Inc., 8 Cir., 110 F. 2d 919.

application of New York Civil Practice Act, § 795, in this case. We may add that, while, of course, Section 795 has a similarity to what we ordinarily think of as garnishment—it attempts to secure for a creditor a claim due to the debtor from a third person—it does not seem to be so considered in the New York statutory scheme. Garnishment is more properly the process, authorized as early at least as 1843, now appearing in New York Civil Practice Act, § 684, for "levy upon earnings or income of a judgment-debtor." This process is limited in various ways in the manner and form of its enforcement and can only be had "where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment-debtor or shall thereafter become due and owing to him, to the amount of twelve dollars or more per week." It was but natural that a new remedy not thus restricted, and enforceable by direct action by the creditor against the third-party debtor, should be thought desirable.[8]

This new remedy of Section 795 seems in many ways more like a proceeding by a receiver in supplementary proceedings authorized under New York Civil Practice Act, §§ 804–810, than like a garnishment action under § 684. Such a receiver could maintain the present action without doubt, even though he, too, in substance is but an instrument for reaching a claim owed to the judgment-debtor. Erwin v. United States, 97 U. S. 392; Goodman v. Niblack, supra; Price v. Forrest, 173 U. S. 410; Western Pac. R. R. v. United States, supra.

A receiver in supplementary proceedings, appointed under §§ 804–810 of the Civil Practice Act, could maintain the present action despite the cry of garnishment. Yet such a receiver is merely an agent of the judgment-creditor. There is no reason to deny a similar power to the judgment-creditor himself when, with the permission of the court, he invokes the short cut authorized by Section 795. His position seems fairly analogous to that of a receiver, acting under the control of the court signing the order.

A final question, whether the United States is a person or corporation indebted to the judgment-debtor within the language of New York Civil Practice Act, § 795, was not briefed or argued, but seems to us of such decisive importance as to deserve our attention here. Nothing in the entire chapter on supplementary proceedings (N. Y. C. P. A., §§ 773–810) indicates whether or not the word "person" includes the State of New York or the United States. "Person" has received varying interpretations in varying

[8] See articles cited, note 6, above.

statutory contexts. Section 37 of the N. Y. General Construction Law defines "person" so as to exclude the sovereign except in one case not now relevant, and it has been held that this exception indicates that "person" does not include the state in any other connection. Saranac L. & T. Co. v. Roberts, 195 N. Y. 303, 323; see Onondaga County Sav. Bank v. Love, 166 Misc. 697, 3 N. Y. S. 2d 428. In Curtis, Statutes and Statutory Construction, 1 McKinney's Consolidated Laws of New York, § 65, we are told that the word "person" is not to be construed as including the sovereign, citing Matter of Fox, 52 N. Y. 530. The Fox case was affirmed by the United States Supreme Court, and the point at issue reiterated, in 94 U. S. 315. And see Davis v. Pringle, 268 U. S. 315.

On the other hand, the Court of Appeals has ruled that a foreign nation is a "person" within the statute requiring nonresident persons to provide security for costs in litigation. Republic of Honduras v. Soto, 112 N. Y. 310. This holding was recently reiterated in Ohio ex rel. Fulton v. Saal, 239 App. Div. 420, 267 N. Y. S. 558, appeal dismissed on other grounds, 264 N. Y. 465, in an opinion discussing the definition of "person" in § 37 of the General Construction Law and refusing to apply it. And in Nardone v. United States, 302 U. S. 379, 383, the word "person" in the Federal Communications Act was held to include both the Government and its agents, over a vigorous dissent by Mr. Justice Sutherland on that very issue. See also Stanley v. Schwalby, 147 U. S. 508, 517.

Despite the General Construction Law, the meaning of the word in each case appears to depend upon the legislature's intent under the circumstances. Matter of Bronson, 150 N. Y. 1, 5. In cases like the present, where speculation over actual intent is futile, we can rely only on our estimate of whether or not the injuries done to the sovereign by including it within the purview of the statute are so great that the legislature can be presumed not to have intended them.

If the state has been made susceptible to all third-party orders in supplementary proceedings, it may, of course, be subject to considerable inconvenience. But there is reason to believe that the legislature might think such embarrassment to be outweighed by the increased efficiency in execution which might thus be achieved. The State of New York permits itself to be garnisheed. New York Civil Practice Act, § 684 (8). The state may also be examined before trial in suits brought against it in the New York Court of Claims. N. Y. Court of Claims Act, § 17. And in at least three third-party actions brought under the new supplementary proceedings chapter, the State of New York has appeared and failed

to object that it was not a "person or corporation indebted to the judgment-debtor." Brearton v. Morgan, 257 App. Div. 34; Hollywood Garage Corp. v. Pettis & Co., Inc., 169 Misc. 906; Heilman v. St. Cloud, 164 Misc. 154.

We regret the necessity of defining the meaning of "person" in Section 795 before any New York court has had an opportunity to do so. Cf. Sammet v. Mayer, 2 Cir., 108 F. 2d 337. But we cannot avoid that responsibility, for the debtor of the judgment-debtor is entitled to attack the validity of the order authorizing supplementary proceedings against him. Nankivel v. Omsk All Russian Government, 237 N. Y. 150, 158. With some hesitation we rule that the sovereign is included within the word "person" in Section 795.

If the legislature intended to include the state as a person in Section 795, it would seem to follow that the United States is likewise so included. The United States, of course, cannot be sued without its consent. But we have already ruled that by the Tucker Act and Rule 17 (b), consent is given to a suit brought by a judgment-creditor of the person holding a claim against the United States, who has been authorized by state law to conduct the action.

In summary, therefore, we see procedural advantages in the course first followed below and do not find it prohibited. Though the issue of consolidation of the two actions was not pressed before us, yet the power to consolidate is given the court whenever "actions involving a common question of law or fact" are pending before it. Rule 42 (a). This would seem a most appropriate case for the exercise of that power. It is not prevented, as urged below, by R. S. § 951, 28 U. S. C. A. § 774, restricting the use of counterclaims against the United States not previously presented to the accounting officers of the Treasury. This claim upon the part of Sherwood, independently asserted in this action, is not a claim which the defendant in the other action has against the opposing party at the time of filing his answer. Rule 13 (a) and (b).

Reversed.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of July one thousand nine hundred and forty.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

JACOB L. SHERWOOD, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS, *Clerk.*

Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed July 12, 1940. D. E. Roberts, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 49, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Jacob L. Sherwood, Plaintiff-Appellant, against United States of America, Defendant-Appellee, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 12th day of July, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fifth.

[SEAL] D. E. ROBERTS, *Clerk.*

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33-51 Supreme Court of the United States

Order allowing certiorari

Filed November 18, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 44849. U. S. Circuit Court of Appeals, Second Circuit. Term No. 500. The United States of America, petitioner, vs. Jacob L. Sherwood. Petition for a writ of certiorari and exhibit thereto. Filed October 11, 1940. Term No. 500 O. T. 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940